IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER 79-5364

DARNELL BROWN,

PETITIONER

VERSUS

STATE OF LOUISIANA,

RESPONDENT

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PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE

STATE OF LOUISIANA

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SUPREME COURT OF THE UNITED STATES

NUMBER _____

DARNELL BROWN,

PETITIONER

VS.

STATE OF LOUISIANA,

RESPONDENT

PETITION FOR WRIT OF CERIORARI

TO THE

SUPREME COURT OF THE STATE

OF LOUISIANA

Darnell Brown respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the opinion and judgment of the Louisiana Supreme Court rendered and entered in case Number 63,171 of that Court May 21, 1979, affirming the judgment of the Criminal District Court, State of Louisiana, Parish of Orleans, Section "F" entered August 23, 1978.

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OPINION BELOW

A copy of the opinion of the Louisiana Supreme Court rendered May 21, 1979 and entered on the same date, affirming the petitioner's conviction is attached hereto as Appendix I. Also included is an order by said court denying a rehearing.

BASIS OF JURISDICTION

Jurisdiction is invoked under Title 28, United States Code, Section 1257(3).

QUESTION PRESENTED

I.

WHETHER THE UNITED STATES SUPREME COURT DECISION IN BURCH V. LOUISIANA, ___U.S.___, (1979), STIKING DOWN A STATE STATUTE ALLOWING CONVICTIONS BY A NONUNANIMOUS SIX PERSON JURY, IS TO BE APPLIED RETROACTIVELY.

STATEMENT OF THE CASE

The defendant, Darnell Brown, is charged with violations of Louisiana Revised Statutes 14:62 and 15:529.1 relative to the offenses of simple burglary and being a multiple offender, respectively. A Bill of Information was filed July 31, 1978 charging defendant with simple burglary. Before trial, defendant filed a Motion to Quash the jury pursuant to Louisiana Code of Criminal Procedure Article 532 (9). The trial Court denied this Motion. On August 23,1978, defendant was tried before a 6-person jury. After a polling of the jury, the verdict was entered 5-1, guilty as charged. On August 30, 1978 defendant appeared with counsel before the trial court and argued for a Motion for a New Trial.

This motion was based on the illegality of the jury size. The trial court denied this Motion. Defendant next filed a Motion to Quash the Multiple Bill which had been filed August 23, 1978. This motion was denied. Defendant then pled guilty as charge to a violation of Louisiana Revised statutes 15:529.1

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(the multiple offender law.) The defendant was sentenced to serve 22 years at hard labor in the custody of the Louisiana Department of Corrections with credit for time served.

Defendant, through his counsel, filed a Motion for Appeal. The Louisiana Supreme Court affirmed defendant's conviction and sentence on May 21, 1979. Defendant applied for a rehearing based on Assignment of Error No. 1, which involved defendant's Motion to Quash the jury. The Louisiana Supreme Court denied defendant's application for rehearing on June 25, 1979. It is this denial by the Louisiana Supreme Court which comprises the subject matter of this writ application.

The facts surrounding defendant's arrest are as follows. On July 22, 1978 at 10:00 a.m. the house located at 2930 Florida Avenue, New Orleans, Louisiana as allegedly broken into by the defendant, Kenella Dixon, who lived in the other half of this double at 2932 Florida Avenue, heard some noises and called the police. Following a police investigation, Darnell Brown was apprehended inside the house. He was subsequently arrested and the trial and sentencing proceeded as stated.

ARGUMENT

ISSUE I

THE UNITED STATES SUPREME COURT DECISION IN BURCH V. LOUISIANA, ___U.S.___ (1979): STRICKING DOWN A STATE STATUTE ALLOWING CONVICTION BY A NON-AUNANIMOUS SIX-MEMBER JURY, SHALL BE APPLIED RETROACTIVELY.

The bill of information in this case charged the defendant, Darnell Brown, with violation of La. R.S. 14:62, relative to the offense of simple burglary. A jury of six persons found the defendant guilty as charged, the verdict being five to one.

In affirming defendant's conviction by a six person jury, the Louisiana Supreme Court found that Assignment of Error No. 1, which involved defendant's Motion to Quash the Petit Jury on the grounds that statutory provisions permitting less than a unanimous vote for conviction violated due process rights, dealt with a question of retroactivity. The Louisiana Supreme Court correctly noted that the United States Supreme Court had recently ruled that convictions (6)

by a nonunanimous six member jury in a state criminal trial for a non-petty offense deprives an accused of his constitutional right to trial by jury. Burch v. Louisiana ___U.S.___(1979). After so noting, the Louisiana Supreme Court stated, "the question presented in this assignment is whether Burch, supra., is to be applied retroactively. We think not." State v. Darnell Brown, 371 So. 2d 746 (1979).

This ruling fails to note the criteria set-up by the United States Supreme Court concerning the issue of retroactivity. The product of this subject area leaves Courts with three choices affecting whether a case that substantially alters the relevant body of prior law should govern:

1. Only future cases and neither the parties before the Court nor any previous or pending cases - pure prospectivity.

2. Future cases as well as the litigants at bar but not previous or pending cases - non-retroactivity.

3. Future cases, the present litigants, and all fact situations arising before the date of the law; changing decisions that are still reviewable by direct appeal or by collateral attack - retroactivity.

Defendant strongly contends that the rule announced in Burch, supra. fits in the third category. An overview of the jurisprudence of retroactivity points to this conclusion. for a detailed discussion of relevant cases, see Ten Years of Non-Retroactivity: A critique and Proposal, 61 Va. L.R. 1557 (1975).

In Linkletter v. Walker, 381 U.S. 618 (1965), the United States Supreme Court rendered its first decision holding a previous constitutional ruling not to be wholly retroactive. The Court held the Mapp exclusionary rule was inapplicable to cases in which the conviction had become final before the date Mapp would not be served by retroactive application. Since this case, significant evolution in the Court's thinking on the subject has occurred, but all questions relating to the scope and application of the concept, it is fair to say, have not as yet been settled. Nonretroactivity has not met with uniform acceptance; a shifting minority of the Court's members have expressed opposition to or at least reservations about the doctrine.

In Linkletter, supra., the Court began to identify the factors relevant to determining whether a particular decision should be given retroactive effect. Also, the Court discussed three then recent law changing decisions which had been given full retroactivity. Giffin v. Illinois, 461 U.S. 12 (1956); Gideon v. Wainwright, 372 U.S. 335 (1963); and Jackson v. Denno, 378 U.S. 368 (1964). The Court refered to a factor that was to occupy a central role in the development of standards for determining retroactivity. In the above three (7)

cases, the legal principle established went to the fairness of the trial - the very integrity of the factfinding process. The Court did not find this consideration applicable in Linkletter, supra., even though the case rule had already been applied to cases on direct review.

In Stovall v. Denno, 388 U.S. 293 (1967), the United States Supreme Court clearly stated the considerations that affect the judgment whether a case reversing prior doctrines in the area of the criminal law should be applied only prospectively:

1. The purpose to be served by the new standards;

2. The extent of the reliance by law enforcement authorities on the old standards; and

3. The effect on the administration of justice of a retroactive application of the new standards.

Using these considerations as a guide, the Court concluded the U.S. v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 273 (1967) rules concerning counsel for confrontations for identification procedures merited only prospective application. While conceding the Wade and Gilbert requirement sought in part to avoid unfairness at trial by enhancing the reliability of the fact finding process, the Court balanced this purpose against reliance and effect. The Court seemed influenced by the lack of any foreshadowing of the new rule.

Thus, the United States Supreme Court set up the Stovall criteria to act as guidelines to resolve the retroactivity issue. Using these guidelines, the United States Supreme Court was able to apply retroactivity to a ruling which established new rules for the composition of juries in capitol cases, Witherspoon v. Illinois, 391 U.S. 510 (1968). In so doing, the Court concluded that improper jury-selecton standards could undermine the integrity of the guilt-determining process. (Witherspoon v. Illinois, footnote 22). Also, in Roberts v. Russel, 392 U.S. 293 (1968), the Court held the Bruton rule to be fully retroactive bacause the error seriously undermines the reliability of the trial process and the Court felt Bruton ought to have been clearly anticipated in light of Jackson v. Denno, supra.

On the other hand, the United States Supreme Court, using the Stovall guidelines applied prospectively the Duncan rule that States cannot deny requests for a jury trial in serious criminal cases. The Court found a good faith reliance on past holdings, predicted a large effect on law enforcement; and deter-

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mined the value implemented by Duncan would not be measurably served. DeStefano v. Woods, 392 U.S. 631 (1968).

Similarly, the United States Supreme Court found prospectivity in Desist v. U.S. 394 U.S. 244 (1969) - dealing with the earesdropping rule adopted in Katz v. U.S., 389 U.S. 347 (1967); in Mackey v. U.S., 401 U.S. 667 (1971)-involving a collateral challenge to an income tax evasion procured through the use of wagering taz forms filed by the defendant under a statute subsequently found to violate the 5th amendment; and in Daniel v. Louisiana, 420 U.S. 311 (1975) - involving the Taylor rule that exclusion of women from jury venire deprives a defendant of his 6th amendment right to trial by an impartial jury.

Finally, in Hankerson v. North Carolina, 432 U.S. 223 (1977), the United States Supreme Court concluded the Mullaney rule requiring States to establish all elements of a criminal offense beyond a reasonable doubt should be given retroactive application. The defendant was convicted prior to Mullaney but the North Carolina Supreme Court refused to give the rule retroactive application, although stating the trial court's instructions to the jury was erroneous.

The United States Supreme Court concluded the State Court erred stating:

> "While in deciding whether a new constitutional rule is to be applied retroactively it is proper to consider the state's reliance on the old rule and the impact of the new rule on the administration of justice if the degree to which the new rule enhances the integrity of the factfinding process is sufficiently small; where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth finding function and so raises serious questions about the accuracy of guilty verdict in past trials, the new rule is given complete retroactive effect."

Thus, the United States Supreme Court has set up a hierarchy among the non-retroactivity criteria with the foremost factor being the purpose to be served by the new rule. In the present situation, the United States Supreme Court clearly States the Purpose of its decision in Burch v. Louisiana, supra.:

> "However, much the same reasons that led us in Ballew to decide that use of a five member jury threatened the fairness of the proceeding and proper role of the jury, lead us to conclude now that conviction for a non petty offense by only five members of a six person jury presents a similar threat to preservation of the substance of the jury trial guarantee and justifies our requiring verdicts rendered by six person juries to be unanimous."

This Burch rule enhances the integrity of the factfinding process by preserving the substance of the jury trial and the uprightness of the guilt-determining conduct. (See Witherspoon v. Illinois, supra. footnote 22 where the United States Supreme Court concluded that improper jury-selection standards could

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determine the integrity of the guilt-determining process.) This new rule raises serious questions concerning the accuracy of guilty verdicts in past trials. The Court in Burch relied on Ballew v. Georgia, 435, U.S. 223 (1978). The premise found in Ballew was that as the jury size decreases, the jury reliability decreases along with the accuracy of a guilty verdict. Thus, to improve this accuracy the Court in Ballew struck down five person juries; likewise the Court in Burch struck down nonunaniminty in six person juries. The first, and most important, criteria points towards retroactive application in the present situation.

Although the United States Supreme Court has not formally ruled on the retroactivity issue concerning the rule announced in Ballew, supra., the Court has, in effect, applied the Ballew retroactively. In Robinson v. Georgia, 435 U.S. 991 (1978) where defendant raised the jury-size issue, the United States Supreme Court vacated the lower court's judgment and remanded the case in light of Ballew v. Georgia, supra. Since the United States Supreme Court is willing to treat Ballew retroactively, then the Court must be willing to treat Burch retroactively due to the fact Burch relied on Ballew's rationale.

Also, petitioner contends Ballew v. Georgia, supra. and Williams v. Florida, 399 U.S. 78 (1970) foreshadowed the holding in Burch, thus obviating any good faith reliance on the State's part. Finally, the effect on the administration of justice would be small indeed. The Court in Burch pointed out only two states had previously allowed nonunanimous six person juries. Within these states, the issue raised here would be moot in all convictions rendered by a 6-0 verdict. More importantly, in the present case, petitioner's conviction was not yet final when the United States Supreme Court handed down its opinion in the Burch case. (April 17, 1979; whereas the Louisiana Supreme Court affirmed petitioner's conviction May 21, 1979). This raises the basic question of why should the Constitution mean one thing to Burch and another to the petitioner, particularly when both litigants are situated similarly in all pertinent respects.

Petitioner submits the answer to this question lies in the fact the situation in the present case points towards full retroactivity of the rule handed down in Burch v. Louisiana, supra. The Louisiana Supreme Court erred in not so ruling.

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CONCLUSION

It is respectfully requested that this petition for a writ of certiorari to review the judgment of the Louisiana Supreme Court be granted.

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SUPREME COURT OF LOUISIANA

MAY 21 1979

STATE OF LOUISIANA

VS. NUMBER 63,171

DARNELL BROWN

APPEAL FROM THE CRIMINAL DISTRICT COURT, SECTION "F," PARISH OF ORLEANS, HONORABLE OLIVER P. SCHULINGKAMP, PRESIDING JUDGE.

* * *

FBB BLANCHE, Justice.

Defendant, Darnell Brown, was charged by bill of information with simple burglary in violation of LSA-R.S. 14:62. On August 23, 1978, after trial before a jury of six persons, defendant was found guilty as charged, the verdict being five to one. Thereafter, the State filed a bill of information pursuant to LSA-R.S. 15:529.1 charging defendant as a third felony offender. At the multiple offender hearing defendant pled guilty and was sentenced as an habitual offender to serve twenty-two years at hard labor in the custody of the Department of Corrections.

Defendant has assigned ten errors as the basis for his appeal before this Court.

In July, 1978, Levertes Dorsch and her daughter, Kenella Dixon, were living respectively at 2930 and 2932 Florida Avenue, a double shotgun house located in New Orleans. On the morning of July 20, 1978, Ms. Dixon took her mother to work and then stopped to pick up some things at the supermarket. After she returned home at about 10:00 a.m., she heard noises which sounded like footsteps from her mother's side of the double. After a brief investigation outside during which she observed that a back window had been broken, she called the police. Defendant was discovered inside Ms. Dorsch's residence by the law enforcement officers. He had been packing various items

	APPROVE	DISSENT	CONCUR	OTHER
	✓			
			✓	
	✓			
	✓			✓
				✓
	✓			

in the house, including cameras, radio, television, et cetera, into boxes and pillow cases. Defendant was arrested and subsequently charged with simple burglary.

Before the trial court, ten assignments of error were filed on behalf of defendant. In brief, no argument has been presented relative to assignments of error numbers three and eight, and they are considered abandoned. State v. Edwards, 261 La. 1014, 261 So.2d 649 (1972).

Assignment No. 1

By this assignment, defendant argues that the trial court erred in denying defendant's motion to quash the petit jury on the grounds that his due process rights were violated by statutory provisions permitting less than a unanimous vote by a jury of only six persons.

On April 17, 1979, the United States Supreme Court in Burch v. Louisiana, ___ U.S. ____, ___ S.Ct. ____, ____ L.Ed2d ___ (1979), held:

> "... [W]e believe that conviction by a nonunanimous six-member jury in a state criminal trial for a nonpetty offense deprives an accused of his constitutional right to trial by jury."

In holding unconstitutional that portion of Article 1, § 17 of the Louisiana Constitution of 1974 which provides "a case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be before a jury of six persons, five of whom must concur to render a verdict," the Court reasoned:

> "We thus have held that the Constitution permits juries of less than 12 members, but that it requires at least six. [Citations omitted] And we have approved the use of certain nonunanimous verdicts in cases involving 12-person juries. [Citations omitted] ... But having already departed from the strictly historical requirements of jury trial, it is inevitable that lines must be drawn somewhere if the substance of the jury trial right is to be preserved. ...
>
> ....
>
> "... [M]uch the same reasons that led us in Ballew to decide that use of a five-member jury threatened the fairness of the proceeding and the

proper role of the jury, lead us to conclude now that conviction for a nonpetty offense by only five members of a six-person jury presents a similar threat to preservation of the substance of the jury trial guarantee and justifies our requiring verdicts rendered by six-person juries to be unanimous. ..."

The question presented in this assignment is whether Burch, supra, is to be applied retroactively. We think not.

Our review of decisions by the United States Supreme Court in other closely related areas leads us to the conclusion that the rule of Burch, supra, should not be applied retroactively to juries empaneled prior to the date of the Burch decision. See Hankerson v. North Carolina, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed2d 306 (1977); Daniel v. Louisiana, 420 U.S. 31, 95 S.Ct. 704, 42 L.Ed2d 790 (1975); DeStefano v. Woods, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308 (1968); State v. Robinson, 361 So.2d 864 (La.1978).

Since at the time of the commission of the instant offense and the defendant's conviction, Louisiana law authorized trial by jury composed of six persons, five of whom were required to concur in order to render a verdict in cases where the punishment may be confinement at hard labor or confinement without hard labor for more than six months, Article 1, § 17 of the Louisiana Constitution of 1974, defendant's conviction by such a jury is valid.

This assignment is, therefore, without merit.

Assignment No. 2

By this assignment, defendant argues that the trial court erred in denying his motion in limine to prevent the State from cross-examining the defendant regarding the details of defendant's convictions for impeachment purposes and in permitting the State to do so during trial.

During the trial, the defendant took the stand and testified in his own behalf. On direct-examination, defendant was questioned about prior convictions. He related that he had four or five prior convictions, including burglary, theft,

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simple escape and trespass, and at the time of trial was on probation for attempted simple burglary. On cross-examination, the following exchange took place between the prosecuting attorney and the defendant:

Q. Mr. Brown, you said you've been convicted of a couple of theft charges; is that right?

A. Yes.

Q. And I want to refer you to a charge from the 19th day of August, 1972, which charges you with attempt to commit simple burglary of a building and structure at 1206 Dryades Street. Do you recall being charged with that?

A. Yes, I do.

Q. The District Attorney in that case allowed you to plead guilty to a theft of a hundred and one dollars, is that correct?

. . . .

BY THE WITNESS:

Yes, because they was supposed to have come picked me up around the corner of the place. They had nine people out there. They come and picked me out the whole crowd.

Q. In other words, you had been charged with attempted burglary but they reduced the charge and let you plead to attempted theft?

A. Yes.

Q. Were you also convicted for receiving stolen property, one camera?

A. Yes.

Q. And I think you did say that you pled guilty to simple escape, is that right?

A. Yes.

Q. From the New Orleans Police Department; is that correct?

A. Huh?

Q. That was a simple escape from the custody of the New Orleans Police Department?

A. No, that wasn't in the custody.

Q. That wasn't?

A. No.

Q. Are you sure about that?

A. Yes.

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Q. Didn't you plead guilty to willfully and unlawfully departing from the lawful custody of the Police Department of the City of New Orleans?

A. I pleaded guilty to--

Q. And from a place where you were lawfully detained by the said Police Department?

A. I pleaded guilty to simple escape, not from no police custody.

Q. And you also have been convicted of criminal trespass, is that correct?

A. Um-hum.

Q. Now, weren't you also charged on the 7th day of February, 1974--

. . . .

Q. Weren't you charged on the 7th of February, 1974, of a simple burglary of the building and structure at 1423 Carondelet Street, Wilson's Auto Repair Shop?

A Yes.

[Q.]And didn't the District Attorney let you ... plead to a felony theft in that case?

A. The D. A. put me down, but the man dropped the charges and they had no case.

Q. They had no case but you pled guilty to it anyway?

A. Yes, I ain't had no choice.

Q. And you were multiple billed on that, weren't you?

A. No, I wasn't.

. . . .

Q. You're sure you weren't

A. Yes, I'm sure.

Q. Do you remember what kind of sentence you got for that theft?

A. Eighteen months.

Q. Weren't you also charged on the 14th day of June, 1977 with attempting to commit simple burglary of an automobile belonging to Leroy White, with the intent to commit a theft therein?

A. I was charged with attempt simple burglary.

Q. You pled guilty to that, right?

A. Yes. I got a five year probation.

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Q. And you also were convicted at one time in the past of being a multiple offender; is that correct?

. . . .

BY THE WITNESS:

No, I wasn't.

. . . .

Q. Did you plead guilty to being a multiple offender, after you were convicted on the attempted burglary for the automobile?

A. No.

Q. Mr. Brown, I'm going to show you what I'm going to mark for identification purposes as State's Exhibit 9, and ask you to look at this document. Is that your name?

A. Yes.

Q. Does that say "attempted simple burglary, a felony?"

A. Y[illegible]

Q. Does that say down here that you had also been convicted earlier in 1974 for theft of a hundred and one dollars?

A. Yes.

Q. Did you plead guilty to being the same person here that had been convicted of attempted simple burglary and the same person then?

A. Yes.

Q. So you were convicted of being a multiple offender; isn't that correct?

A. I don't know about that. I don't know nothing about the multiple offender law. I don't know what that means.

BY MR. HARPER:

I don't have any further questions.

In State v. Jackson, 307 So.2d 604 (La.1975), this Court reversed the prior jurisprudence and held that the prosecution, in impeaching the credibility of a defense witness, may not only establish prior convictions of the witness, but may also cross-examine the witness about the details of the prior convictions in order to show the "true nature" of the offenses. The Jackson holding has since been extended to defendants testifying

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in their own behalf. State v. Sykes, 364 So.2d 1293 (La.1978); State v. Thompson, 364 So.2d 908 (La.1978); State v. Carter, 363 So.2d 893 (La.1978); State v. Dupar, 353 So.2d 272 (La.1977); State v. Elzie, 351 So.2d 1174 (La.1977); State v. Chenier, 343 So.2d 177 (La.1977); State v. Jackson, 339 So.2d 730 (La. 1976); State v. Williams, 339 So.2d 728 (La.1976); State v. Elam, 312 So.2d 318 (La.1975); State v. Jackson, 307 So.2d 604 (La.1975).

While reaffirming the principles set forth in Jackson, supra, and its progeny, we are, nevertheless, aware that a Jackson cross-examination is not without its limits. The extent to which the inquiry into past convictions can be permitted is dependent upon the facts of the particular case. The trial judge has great discretion in determining the depth and length of the inquiry. This discretion will not be disturbed absent a showing of abuse.

In the instant case, we believe the nature and scope of the questioning was well within the limits of Jackson and the trial judge did not abuse his discretion in overruling the defendant's motion in limine and contemporaneous objections. This assignment is, therefore, without merit.

Other Assignments

We have carefully reviewed assignments of error numbers 4, 5, 6, 9 and 10. We find that none of these assignments of error present reversible error, nor do any involve legal issues not governed by clearly established principles of law. We find these assignments to be without merit.

DECREE

Accordingly, the conviction and sentence of the defendant are affirmed.

AFFIRMED.

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SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

VERSUS NO. 63,171

DARNELL BROWN

GTC

CALOGERO, Justice, concurring

I again express my disagreement with the holdings of State v. Jackson, 307 So.2d 604 (La. 1975) and its progeny, which approve cross-examination of a testifying defendant concerning the details of prior convictions. See my dissent in State v. Chenier, 343 So.2d 177 (La. 1977). However, because a majority of the Court presently adheres to the view that this cross-examination is permissible, I respectfully concur.

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Date: June 25, 1979

SUPREME COURT OF LOUISIANA

NO. 63,171

State of Louisiana

VERSUS

Darnell Brown

On Appeal from the Criminal District Court,
Parish of Orleans, Hon. Oliver P. Schulingkamp,
Judge Presiding

On Application for Rehearing

Denied.

FWS

AT JR

JAD

PFC

WFM

JLD

FAB

SUPREME COURT OF LOUISIANA
A TRUE COPY
Evans J. Labranche, Jr.
Clerk of Court

STATE OF LOUISIANA — NUMBER 265-832 SECTION "F"

VERSUS — CRIMINAL DISTRICT COURT

DARNELL BROWN — PARISH OF ORLEANS

ASSIGNMENT OF ERRORS AND

DESIGNATION OF RECORD FOR APPEAL

TO THE HONORABLE OLIVER SCHULINGKAMP, JUDGE, SECTION "F".

MAY IT PLEASE THE COURT:

Defendant, Darnell Brown, through his undersigned counsel, pursuant to C.Cr.P., Articles 844 and 845 respectfully designates the following errors to be urged upon the appeal of the above numbered and entitled matter, and designates the record for same.

ASSIGNMENT OF ERROR NO. 1

Prior to trial, counsel for defendant filed a Motion to Quash the petit jury on grounds that the defendant's due process rights under the Sixth and Fourteenth Amendments were violated by a less than unanimous vote by a six person jury and that defendant was entitled to a twelve person jury (Ballew v. Georgia, 98 S.Ct. 1029 (1978) (Tr. page 1 lines 7-18). Defendant objected to the court's ruling overruling the Motion to Quash.

ASSIGNMENT OF ERROR NO. 2

Prior to trial, counsel for defendant filed a request for a Motion in Liminae to prevent the State from amplifying and bringing out the nature of the charges for which defendant had been previously convicted by impeachment concerning two prior convictions of reduced charges and the charge for which defendant was arrested (Tr. page 2 line 7). Defendant objected to the court's ruling.

ASSIGNMENT OF ERROR NO. 3

During the State's voir dire examination defense counsel objected to improper statements by the prosecutor (Tr. 3 line 15); to an improper statement by the prosecutor which characterized the burden of proof as "no big thing" (Tr. page 4 lines 3-11) and to the prosecutor's improper comment on "reasonabl[illegible] doubt" (Tr. page 5 lines 1-13).

ASSIGNMENT OF ERROR NO. 4

During the opening statement by defense counsel, the Court sustained the prosecutor's objection to defense counsel's statement and limited the defendant's opening statement, (Tr. page 7 line 7) to which defense counsel objected.

ASSIGNMENT OF ERROR NO. 5

On direct examination during trial, defense counsel objected to the prosecutor leading the witness to express an opinion, (Tr. page 18 line 21) and at (Tr. page 23 lines 5-27) objected to a question which was beyond the scope of the witnesses' knowledge. The court allowed these improper comments from the State's witness over defense counsel's objection.

ASSIGNMENT OF ERROR NO. 6

During cross-examination of the defendant the prosecutor improperly commented on a statement allegedly made by the accused. Defense counsel requested the defendant's testimony read in open court to the jury to clarify his prior statement and cure the prosecutor's misleading statement. Defense counsel objected to the court's ruling refusing to have the testimony read. (Tr. page 55 lines 7-27 and page 56 lines 1-5).

ASSIGNMENT OF ERROR NO. 7

During cross-examination, defense counsel objected to the prosecutor's questions concerning the nature of the prior arrest circumstances and conviction circumstances relative to a plea to a reduced charge (Tr. page 59, 60, 61) and defense counsel moved for a mistrial (Tr. page 62 line 12) due to the prosecutor's improper reference to the characterization of a conviction as a "multiple offender." The court overruled defense counsel's objection and denied the motion for mistrial.

ASSIGNMENT OF ERROR NO. 8

Defense counsel objected to the prosecutor's closing argument (Tr. page 66 line 1-27) and renewed defendant's motion for mistrial (Tr. page 67 line 18) which was denied by the court.

ASSIGNMENT OF ERROR NO. 9

Defendant assigns as error the ruling of the trial court denying his motion for a New Trial.

ASSIGNMENT OF ERROR NO. 10

Defendant assigns as error the court's ruling on the Motion to Quash based on a previous enhanced penalty used to secure a conviction and which cannot be used to enhance another penalty.

AND NOW;

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF LOUISIANA;

MAY IT PLEASE THE COURT:

In addition to the above ten (10) errors assigned, the defendant requests this Honorable Court to review the entire record and all of the evidence as reflected by the various transcripts, pleadings and exhibits as provided by Louisiana Constitution 1974, Article 1, Section 19.

Respectfully submitted:

JOHN M. LAWRENCE
ATTORNEY FOR DEFENDANT
ORLEANS INDIGENT DEFENDER PROGRAM
2700 TULANE AVENUE, ROOM 112
NEW ORLEANS, LOUISIANA 70119
TELEPHONE: 821-8101

CERTIFICATE

I certify that a copy of the foregoing has been delivered to the Honorable Oliver Schulingkamp, Judge, Section "F" of the Criminal District Court for the Parish of Orleans, and a copy of the foregoing has been delivered to the deputy Clerk of Court assigned to Section "F" of the Criminal District Court for the Parish of Orleans, by hand, by me on the ____ day of _____, 1978.

JOHN M. LAWRENCE

New Orleans, Louisiana,

1978